UNREPORTED

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.721 OF 2003
IN
SUIT NO.715 OF 1992

Chandrakant Vadilal Shah, Adult, Indian Inhabitant, residing at Paradise Apartments, A-2, Near Vishnu Baug, Behind Amber Oscar Cinema, S.V. Road, Andheri (West), Bombay - 400 058. ..Appellant/ original deft. No.2.

V/s.

1) Vinodkumar Chunilal Shah, Aged 57 years, Indian Inhabitant, residing at Gautam Gyan building, "C" Wing, Flat No.37, 2nd floor, Near Damodar Wadi, Ashok Chakravarti Road, Kandivli(West), Bombay - 400 101.

2) Vijaya Bank, a Nationalised Bank, having its registered office at 14, M.G. Road, Bangalore - 560 001 and its Zonal office at S.V. Road, Santacruz (West), Bombay-400 056 and its Bank branch at 1-B, Alka chambers, S.V. Road, Andheri (West), Bombay - 400 058.

3) Sheela Chandrakant Shah, Adult, Indian Inhabitant, residing at Paradise Apartments A-2, Near Vishnu Baug, Behind Amber Oscar Cinema, S.V. Road, Andheri (West),Bombay - 400 058. ..Respondents/ (No.1 - orig. plaintiff; Nos.2 & 3 orig. defts. No.1 & 3).

Mr.H.J. Thakkar, senior Advocate i/b. Ms. Jyotsna N Pandhi for appellant.

Mr.V.C. Shah, respondent No.1 in person.

Mr.Umesh Shetty, advocate for respondent No.2.

WITH

APPEAL NO.58 OF 2004
IN
SUIT NO.715 OF 1992

Vijaya Bank, a Nationalised Bank, having its registered office at 14, M.G. Road, Bangalore - 560 001 and its Zonal office at S.V. Road, Santacruz (West), Bombay-400 056 and its Bank branch at 1-B, Alka chambers, S.V. Road, Andheri (West), Bombay - 400 058.	..Appellant/ original deft.No.1.

V/s.

1) Vinodkumar Chunilal Shah, Aged 55 years, Indian Inhabitant, residing at Gautam Gyan building, "C" Wing, Flat No.37, 2nd floor, Near Damodar Wadi, Ashok Chakravarti Road, Kandivli(West), Bombay - 400 101. 2) Chandrakant Vadilal Shah, 3) Sheela Chandrakant Shah, Nos. 2 & 3 adults, Indian Rehabitants, residing at Paradise Apartments A-2, Near Vishnu Baug, Behind Amber Oscar Cinema, S.V. Road, Andheri (West),Bombay - 400 058.	..Respondents/ (No.1 - orig plaintiff Nos.2 & 3 original defendants.

Mr. Umesh Shetty, Advocate for appellant.

Mr. V.C. Shah, respondent No.1 in person.

Mr.H.J. Thakkar, senior Advocate i/b. Ms. Jyotsna N. Pandhi for respondent No.2.

CORAM : R.M.LODHA AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON 9TH SEPTEMBER, 2004

JUDGMENT PRONOUNCED ON 16TH SEPTEMBER,2004

JUDGMENT (PER J.P. DEVADHAR, J.)

1. In these two appeals the Judgment and order passed in Suit No.715 of 1992 is challenged wherein the learned Single Judge has decreed the suit and held that both the appellants who were defendants in the suit are jointly and severally liable to pay to the plaintiff an amount of Rs.2,96,000/- with interest thereon at the rate of 15% per annum from the date of the cheque till realisation of the decretal amount and Rs.25,000/- towards damages and costs of the suit. As the issues raised in these two appeals are interlinked and arise from a common Judgment, both these appeals are heard together and disposed of by this common Judgment.

2. Brief facts relevant for these appeals are that Mr.Vinodkumar C.Shah, the respondent No.1 in both these appeals (hereinafter referred to as 'the plaintiff') carrying on business in the name of Kirtivardhika Corporation had filed the above suit bearing No.715 of 1992 in this court against Chandrakant V. Shah, the appellant in Appeal No.721 of 2003 (hereinafter referred to as 'the defendant No.2') as well as Vijaya Bank, Andheri (W) Branch, Mumbai who is the appellant in Appeal No.58 of 2004 (hereinafter

referred to as ‘the defendant No.1’) and the respondent No.3 (hereinafter referred to as ‘the defendant No.3’) for recovery of a sum of Rs.4,84,110/- with interest or damages at the rate of 21% per annum on Rs.2,97,000/- from the date of the filing of the suit till realisation and Rs.50,000/- as special damages. The defendant No.3 is the wife of defendant No.2. The plaintiff and defendant No.2 are related as the wives of plaintiff and defendant No.2 are sisters. By the impugned Judgment, the suit has been decreed by the learned Single Judge only against the defendant Nos.1 & 2 and the suit against the defendant No.3 has been dismissed.

3. Till 1971 the plaintiff was serving as a Manager in the State Bank of Saurashtra. In the year 1971 the plaintiff took voluntarily retirement from service. Thereafter, for some time, the plaintiff was working as Managing Director of a private limited company at Bhavanagar. Some time in the year 1980 the plaintiff left the said company at Bhavnagar and shifted and settled down at Bombay. It is the case of the plaintiff that during the period from 1980 to 1986 the plaintiff was acting as a consultant and adviser to the defendant Nos.2 & 3 who were carrying on the business in the name of Mahalaxmi Dyes and Chemicals

('MDC' for short) and also in the name of Chittal Chemicals. In addition to the above Consultancy Services the plaintiff was also carrying on business in chemicals in the name of 'Kirtivardhika Corporation'. The plaintiff had also business relations with the defendant Nos. 2 & 3.

4. It is the case of the plaintiff that he had given a personal loan of Rs.1 lakh to the defendant No. 3 by cheque on 31/5/1983 and loan of Rs.1.79 lakhs to the defendant Nos.2 & 3 on account of MDC by cheque dated 8/9/1985. Both these amounts were repaid by defendant Nos.2 & 3. Similarly, on 8th July, 1986 he had advanced a loan of Rs.2,96,817/- to the defendant Nos.2 & 3 on account of Chittal Chemicals and the said loan was sought to be repaid by the defendant Nos.2 & 3 from the account of MDC on 9/4/1987 vide cheque No.831301 dated 7/4/1987 for Rs.2,96,817/- which is the subject matter of the dispute in these proceedings.. The plaintiff as well as the defendant Nos.2 & 3 had bank account with the defendant No.1 bank at the Andheri (West) branch. On 9/4/1987 the said cheque for Rs.2,96,317/- was deposited by the plaintiff in the above branch of defendant No.1 for collection and credit to the account of Kirtivardhika Corporation. It is the case of the plaintiff that the defendant No.1

bank on collecting the amount credited the same to the account of Kirtivardhika Corporation and confirmed the said collection by making a credit entry in the passbook.

5. After the above cheque was credited the plaintiff wanted to withdraw cash. As the plaintiff was not having a cheque book at that time, he requested the acting Manager of the defendant No.1 to supply a loose leaf cheque for such withdrawal which was supplied. Through the said loose cheque, the plaintiff drew a cheque for Rs.2,97,000/- payable cash to "V.C.Shah" i.e. the plaintiff himself. The said loose cheque was accepted for payment by the defendant No.1 bank and token No.27 was issued to the plaintiff in respect thereof. Thereafter, on verification of the account the said cheque was passed for payment and was sent to the cashier for payment. According to the plaintiff, the said withdrawal cheque for Rs.2,97,000/- was cleared for payment is evident from the debit entry made by the bank in the account of Kirtivardhika Corporation and the same is further confirmed by the bank by making an entry in the passbook. However, when the plaintiff went to the cashier to collect the amount, he was informed that the payment has been made to the defendant No.2 and the plaintiff was asked to

return the token No.27. As the Plaintiff declined to hand over the token No.27 without receiving the amount, the plaintiff was encircled by 8 employees of the bank and was not allowed to move. Somehow the plaintiff managed to escape from them and leave the bank premises. The plaintiff wanted to make a complaint to the Manager of the bank in writing, but the Manager of the bank declained to accept the same. On the same day at about 3.00 p.m. the plaintiff made a complaimt in writing to the Zonal office of the defendant No.1 bank setting out the above facts. The date on the said letter was inadvertently put as 8/4/1987 instead of 9/4/1987.

6. It is the case of the plaintiff that in spite of repeated requests the bank failed and neglected to make payment of Rs.2,97,000/- to the plaintiff under token No.27 even after debiting his account for that amount. Therefore, the plaintiff filed criminal cases in the Metropolitan Magistrate’s Court at Bombay against some of the officers of the defendant No.1 bank and the same are pending. According to the plaintiff, the officers of the defendant No.1 in connivance with the defendant Nos.2 & 3 have forged certain documents and manipulated certain records in order to hide their criminal acts. During

the course of investigation of the criminal case by the police, the plaintiff came to know that on 9th April, 1987 the defendant No.2 had paid to the cashier a sum of Rs.3,000/-, but prepared pay in slip for Rs.3,00,000/- and the cashier had made entries in the cash receipt register showing receipt of Rs.3,00,000/- in the account of MDC. Thus, according to the plaintiff, the bank in collusion with defendant Nos.2 & 3 had paid the withdrawal amount of Rs.2,97,000/- due to the plaintiff to the defendant Nos.2 & 3 and together with the cash deposit of Rs.3,000/- made by the defendant No.2, the bank had wrongfully and illegally credited a sum of Rs.3,00,000/- in the account of MDC. In these circumstances, the plaintiff filed the above suit seeking a decree against the defendants jointly and severally for Rs.2,97,000/- and also for interest and special damages.

7. The defendant No.1 bank in its written statement denied the claim of the plaintiff and submitted that the plaint discloses no cause of action against the bank and the suit is barred by the law of limitation. As regards the disputed transactions, it was stated that on 9/4/1987 the plaintiff had deposited a cheque for Rs.2,96,817/- drawn by MDC in favour of Kirtivardhika Corporation. The said MDC was enjoying

the O.L.C.C. facilities with the defendant No.1 bank and on 9/4/1987 there was debit balance in the account of MDC. It was stated that though the cheque for Rs.2,96,817/- was debited to the said O.L.C.C. account, the entry was not passed by the concerned officer of the defendant No.1 bank. At that point of time, the defendant No.1 bank received instructions from the defendant No.2 to stop payment of the aforesaid cheque. In these circumstances, the entry made in the account was struck out. In the meantime, the cheque presented by the plaintiff for Rs.2,97,000/- (for drawing cash) was entered in the current account of Kirtivardhika Corporation and the token was issued to the plaintiff. The said entry was also cancelled as the payment of the amount under the cheque issued by MDC in favour of the plaintiff was stopped. As a result of the cancellation of the entries the credit balance in the account of Kirtivardhika Corporation on 9/4/1987 being only Rs.671.75, the withdrawal cheque for Rs.2,97,000/- presented by the plaintiff could not be honoured and, therefore, the plaintiff was called upon to return the token No.27 which was given to him earlier. As the plaintiff declined to return the token, the unpaid cheque was retained by the bank. Thereafter, by a letter dated 16th April, 1987 the plaintiff was informed that the cheque deposited by the

plaintiff has not been encashed. In the written statement it was further stated by the defendant No.1 bank that due to the stop payment instructions the cheque deposited by the plaintiff could not be actually credited to the account of the plaintiff and consequently the withdrawal cheque presented by the plaintiff for Rs.2,97,000/- could not be honoured as the credit balance in the account of Kirtivardhika Corporation was only Rs.671.75. It was stated that the entries in the accounts of MDC and Kirtivardhika Corporation were made in anticipation of the funds and on receipt of 'stop payment' instructions from the defendants, all the above entries have been rightly cancelled, as per the usual banking practice. Accordingly, it was submitted that there is no cause of action against the bank and the claim of the plaintiff as against the defendant No.1 bank is liable to be dismissed.

8. The defendant Nos.2 & 3 in their written statement admitted that during the year 1983-86 they had business relations with the plaintiff but stated that all the accounts between the parties were settled and nothing was due and payable by them to the plaintiff. It was denied that on 8/7/1986 the plaintiff had given a loan of Rs.2,96,817/- to the

defendant Nos. 2 & 3 on account of Chittal Chemicals. According to the defendant Nos.2 & 3 the facts were that on or about 29th November, 1984 the plaintiff who is Proprietor of the Kirtivardhika Corporation had sold hydrogen peroxide valued at Rs.2,96,817/- to Chittal Chemicals for which the said Chittal Chemicals had made payment to the plaintiff by cheque drawn on defendant No.1 bank and the same were encashed and confirmed by the plaintiff. Thereafter, on or about 28/6/1986 the said Chittal Chemicals had sold the same material to Kirtivardhika Corporation for the same amount of Rs.2,96,817/- and on or about 9/7/1986 Kirtivardhika Corporation made the payment for the same by cheque dated 8/7/1986 which is the subject matter of the present suit. According to the defendant Nos.2 & 3, there were two transactions in respect of the same materials for which payments were made by each party to the the other party. Thus, the payment of Rs.2,96,817/- made by the plaintiff to Chittal Chemicals vide cheque dated 8/7/1986 was not a loan but the price of the goods sold by the Chittal Chemicals to the plaintiff on 28/6/1986.

9. The defendant Nos.2 & 3 further stated that on or about 7/4/1987 the plaintiff telephoned the defendant No.2 and informed that the plaintiff had

stock of hydrogen peroxide worth Rs.2,96,817/- in his godown which due to off season could not be sold and requested the defendant No.2 to purchase the same. The defendant No.2, therefore, placed an order for purchase of the said material and gave a cheque dated 7/4/1987 for Rs.2,96,817/- from the account of MDC in favour of Kirtivardhika Corporation. It was agreed between the plaintiff and defendant Nos. 2 & 3 that the goods will be delivered against payment simultaneously. But the plaintiff, however, with malafide intention failed to deliver the goods to the defendant No.2 in spite of agreeing to deliver the goods. The defendant No.2 suspecting malafide intention of the plaintiff gave instructions to the defendant No.1 bank to stop payment of the said cheque dated 7/4/1987 for Rs.2,96,817/-. According to the defendant Nos.2 & 3 the plaintiff has suppressed these facts and had concocted a false story of converting the business transaction into the alleged loan transaction.

10. The defendant Nos.2 & 3 further stated that in the plaint it is averred by the plaintiff that the loan was given to Chittal Chemicals; whereas, in the statement submitted before the P.S.I., C.P. and C.I.D. Mumbai on 23rd April, 1987 the plaintiff has stated that the alleged loan was given to MDC. In view of

this contradictory statements, the plaintiff is not entitled to the relief claimed in the suit. It was stated that in view of the pending criminal proceedings, the defendant Nos.2 & 3 would not make any further comments in respect of the cheque for Rs.2,96,817/-. However, it was stated that no amount was due and payable by them to the plaintiff and accordingly, it was prayed that the suit filed by the plaintiff be dismissed.

11. With these pleadings, the issues were framed and the parties led evidence in the matter. The plaintiff and defendant No.2 examined themselves and on behalf of the defendant No.1 evidence was led by Mrs.Chitra Sudhakar, Asstt. Manager of the defendant No.1 bank. After considering the evidence and after hearing the counsel on both the sides, the learned Single Judge by the impugned Judgment and order dated 8/7/2003 held that the plaintiff has proved his case and accordingly directed that the defendant Nos.1 & 2 are jointly and severally liable to pay to the plaintiff Rs.2,96,000/- with interest at the rate of 15% per annum from the date of the cheque till realisation of the decretal amount and also Rs.25,000/- towards damages and costs of the suit. Being aggrieved by the aforesaid Judgment, the defendant No.1 and

defendant No.2 have filed these two appeals.

12. Mr.Thakkar, learned senior advocate appearing on behalf of the defendant No.2 took us through the evidence recorded by the trial Court and the documents tendered in evidence. He submitted that from the evidence on record, it is clearly established that the cheque for Rs.2,96,817/- given by the plaintiff on 8/7/1986 was not by way of loan but it was towards the price of the goods sold by Chittal Chemicals to the plaintiff on or about 28/6/1986. The counsel referred to the invoice No.3248 dated 28/6/1986 for Rs.2,96,817/- and the ledger folio of Kirtivardhika Corporation in the books of account maintained by Chittal Chemicals to show that the amount paid by the plaintiff on 8/7/1986 was towards the goods sold by Chittal Chemicals to the plaintiff under the invoice dated 28/6/1986. Accordingly, Mr.Thakkar submitted that the amount of Rs.2,96,817/- paid by the plaintiff to Chittal Chemicals was not a personal loan as alleged by the plaintiff and the learned Single Judge erred in decreeing the suit against the defendant No.2.

13. Mr.Thakkar further submitted that the case of the plaintiff that on 8/7/1986 he had advanced a sum of Rs.2,96,817/- to the Chittal Chemicals is falsified

by his own statement made before police on 23/4/1987 and in the two criminal complaints filed by the plaintiff in the 10th Metropolitan Magistrate Court at Andheri dated 13/4/1987 and 14/10/1987 respectively. In the statement made before the police and in the criminal complaint filed the plaintiff had stated that the amount of Rs.2,96,817/- due to him was from MDC. Relying on the decision of the Apex Court in the case of **Khatri & Ors. V/s. State of Bihar** reported in **1981 Cri. L.J. 597** and the decision of the Calcutta High Court in the case of **Biswanath Agarwalla V/s. Dhupa Debi** reported in **A.I.R. 1960 Calcutta 494**, Mr.Thakkar submitted that in the light of the aforesaid statements of the plaintiff in the criminal proceedings which are admissible in evidence, the case of the plaintiff that on 8/7/1986 he had advanced loan to Chittal Chemicals stands completely falsified. As the foundation on which the suit claim was based could not be established by the plaintiff Mr.Thakkar submitted that the suit could not be decreed in favour of the plaintiff and against the defendant No.2.

14. With reference to the cheque for Rs.2,96,817/- issued by MDC on 7/4/1987, Mr.Thakkar submitted that on 7/4/1987 the plaintiff intended to sell hydrogen peroxide worth Rs.2,96,817/- and in

anticipation of simultaneous delivery of goods, the defendant No.2 had issued the cheque on account of MDC. Mr.Thakkar submitted that when the defendant No.2 came to know that the plaintiff without delivering the goods sought to encash the cheque, the defendant No.2 instructed the bank to stop payment. Mr.Thakkar submitted that in the absence of delivery of goods by the plaintiff, the defendant No.2 was justified in instructing the bank to stop payment of the cheque issued by MDC on 8/4/1987. In these circumstances, it was submitted that the learned Single Judge was in error in holding that the plaintiff is entitled to the amount under the cheque dated 8/4/1987 and pass a decree in favour of the plaintiff and against defendant No.2.

15. With reference to the entries made by the bank in the accounts of MDC and Kirtivardhika Corporation, Mr.Thakkar submitted that in the absence of any independent evidence, mere entries made by the bank in the accounts would not be sufficient to establish the claim in the suit. In this connection, Mr.Thakkar relied upon the decision of the Apex Court in the case of **Chandradhar Goswami & Ors. V/s. The Gauhati Bank Ltd.** reported in **(1967) 1 S.C.R. 898**. In the present case, he submitted that although the

entries were made in the accounts of MDC and Kirtivardhika Corporation by the bank, the said entries were not actually passed and on receiving the stop payment instructions, the entries made in the accounts were struck off. He submitted that on 9/4/1987 the credit balance in the account of Kirtivardhika Corporation was Rs.675.51. Similarly, in the account of MDC to whom cash credit facility upto Rs.2,50,000/- was granted, there was debit balance of Rs.1,59,170.60 leaving only Rs.90,829.40 available for withdrawal. After the plaintiff deposited the cheque of MDC for Rs.2,96,817/- debit entries were made in the accounts of MDC and credit entries were made in the accounts and in the passbook of the Kirtivardhika Corporation in anticipation of the funds in the account of MDC. However, instead of depositing funds stop payment instructions were issued by the defendant No.2 orally and subsequently in writing and, therefore, the entries made in both the accounts were deleted. As the cheque deposited by the plaintiff was not encashed, the question of honouring the withdrawal cheque presented by the plaintiff did not arise at all. In these circumstances, Mr.Thakkar submitted that making entries in the accounts and deleting the same on receiving stop payment instructions were bona fide and the plaintiff cannot claim the amount based on the entries when the

said entries have been deleted.

16. Mr.Umesh Shetty learned advocate appearing on behalf of the defendant No.1 bank submitted that on presentation of the cheque entries were made in the accounts in the ordinary course of business but before the said entries could be actually passed stop payment instructions were received and hence the entries were deleted. He submitted that the defendant No.1 being a nationalised bank was not interested in the personal dispute between the plaintiff and the defendant No.2. He submitted that on 9/4/1987 the amount lying to the credit of Kirtivardhika Corporation was only Rs.671.75 and the amount that could be withdrawn from the account of MDC was only Rs.90,829.60. Therefore, the cheque of MDC for Rs.2,96,817/- in favour of Kirtivardhika Corporation could not be passed because the balance available in the account of MDC was only Rs.90,829.60. The entries in the accounts were made in anticipation of the funds. In the present case instead of funds, stop payment instructions were received. In these circumstances, as soon as stop payment instructions were issued by the defendant No.2 the entries made in the account of MDC and Kirtivardhika Corporation were deleted. He submitted that merely because entries were made in the passbook of Kirtivardhika Corporation in

anticipation of the funds in the account of MDC and that entry was deleted on receiving stop payment instructions, it could not be said that the plaintiff is entitled to the amount under the cheque issued by MDC for Rs.2,96,817/-. Accordingly, the counsel submitted that there was no liability which could be fastened upon the bank and the learned Single Judge was in error in holding that the defendant No.1 bank is jointly and severally liable to pay the amount with interest and damages.

17. Mr.Vinodkumar Shah, the plaintiff appearing in person submitted that the entries in the accounts are made only after the cheques presented are duly passed by the concerned officers of the bank. In the present case, the fact that the cheque for Rs.2,96,817/- deposited by the plaintiff was duly passed by the concerned officer is evident from the fact that after making credit entries in the account of Kirtivardhika Corporation, credit entries were also made by the bank in the passbook of Kirtivardhika Corporation. He submitted that the case of the bank that the entries in the passbook were made even before the entries were actually passed by the concerned officer of the bank is totally unbelievable. Accordingly, it was submitted that once the credit

entry was made in the passbook of Kirtivardhika Corporatrion, it was not open to the bank to delete the entries behind the back of the plaintiff and deny the amount credited to the account.

18. Mr.Shah, the plaintiff in person, further submitted that the amount of Rs.2,96,817/- was actually credited to the account Kirtivardhika Corporation is further established by the fact that the withdrawal cheque for Rs.2,97,000/- presented by the plaintiff was also honoured by making debit entries in the account and in the passbook of Kirtivardhika Corporation. If there was no amount lying to the credit of the Kirtivardhika Corporation, then, the debit entry for Rs.2,97,000/- could not have been made in the account of Kirtivardhika Corporation and no entry to that effect could be made in the passbook of Kirtivardhika Corporation. Therefore, according to Mr.Shah the amount of Rs.2,96,817/- was in fact credited to the account and withdrawal cheque of the plaintiff for Rs.2,97,000/- was also honoured, however, instead of giving that amount to the plaintiff the same was illegally given by the bank to the defendant No.2 with malafide intentions to favour the defendant No.2.

19. Mr.Shah, the plaintiff in person, further

submitted that the above contention of the plaintiff is further supported from the fact that on 9/4/1987 the defendant No.2 deposited a sum of Rs.3,000/- and the cashier added Rs.2,97,000/- being the amount of the plaintiff's cheque to the amount of Rs.3,000/- paid by defendant No.2 and made a credit entry of Rs.3,00,000/- in the account of MDC. The fact that the amount of Rs.3,00,000/- has been credited to the account of MDC is evidenced from the entries made in the cashier's cash register (Exhibit P-8) and the officers cash scroll register (Exhibit P-9). Thus, the amount due to the plaintiff vide withdrawal cheque for Rs.2,97,000/- presented by the plaintiff has been illegally and fraudulently credited to the account of the defendant No.2. He submitted that once the entries were made in the passbook validly, it was not open to the bank to delete the said entries and deny the plaintiff the amount credited to his account. He submitted that once the credit entries were made in the passbook the bank cannot escape its liability so far as the plaintiff is concerned. Accordingly, the plaintiff submitted that the Judgment of the learned Single Judge is just and proper and both the appeals are liable to be dismissed.

20. Before dealing with the rival contentions, at the outset we would like to record that although an

issue as to whether the suit was barred by limitation was framed, it appears that no arguments were advanced in that behalf and in para 32 of the Judgment, the learned Single Judge has recorded as follows:-

> "32. So far as the issue No.5 is concerned, nothing was argued on this issue as to how the suit was not maintainable or that the plaintiff has no cause of action neither the defendant could prove that the suit was barred by limitation nor they could prove that the suit was bad for misjoinder of cause of action and parties." (sic).

Even before us neither the counsel for the defendant No.2 nor the counsel for the defendant No.1 have canvassed any arguments on the issue of limitation. Accordingly, we propose to deal with only those arguments which were canvassed before us.

21. First, we would like to deal with the arguments advanced on behalf of the defendant No.2. According to the defendant No.2, the plaintiff has failed to establish that he had advanced a loan of Rs.2,96,817/- to Chittal Chemicals on 8/7/1986 and the suit must fail on this ground alone. There is no merit in this contention. It is not in dispute that the cheque for Rs.2,96,817/- issued by the plaintiff on 8/7/1986 has been credited to the account of Chittal Chemicals. In fact, the defendant No.2 in his examination-in-chief has admitted the receipt of the

said amount by Chittal Chemicals. However, the case put forth by the defendant No.2 is that the said amount was paid by the plaintiff towards the price of the goods sold and delivered by Chittal Chemicals to the plaintiff on 28/6/1986. In this connection, heavy reliance was placed on the invoice raised by the defendant No.2 bearing No.3248 dated 28/6/1986. However, the said invoice does not bear the endorsement of the plaintiff and, therefore, it cannot be said that the said invoice was received by the plaintiff. There is no other independent evidence adduced to establish that Chittal Chemicals had sold goods worth Rs.2,96,817/- to the plaintiff on 28/6/1986. Hence, the case put forth by the defendant No.2 that the amount of Rs.2,96,817/- paid by the plaintiff on 8/7/1986 was towards the goods sold by Chittal Chemicals to the plaintiff on 28/6/1986 cannot be accepted.

22. Relying upon the decision of the Apex Court in the case of Khatri & Co. (supra) and a decision of the Calcutta High Court, it was contended that in view of the statements made by the plaintiff in the criminal proceedings to the effect that the amounts were advanced by him to MDC, the claim in the suit that the amounts were advanced to Chittal Chemicals

must fail and hence the suit is liable to be dismissed. There is no merit in this contention either. The statement made before the police is neither legal nor substantive piece of evidence. Much emphasis was laid by the learned senior counsel that the said police statement was exhibited by consent. Merely because a document tendered in evidence is marked exhibit, the contents of the document are not proved thereby. The police officer who recorded the statement has not been produced to prove the contents. We have no hesitation in holding that the statement made before the police during investigation cannot be relied upon. The cited decisions are not applicable to the facts of the present case.

23. The defendant No.2 in the written statement as well as in his evidence has categorically admitted that the amount of Rs.2,96,817/- advanced by the plaintiff on 8/7/1986 has been received and entered in the books maintained by Chittals Chemicals. Having scanned the entire evidence we find that the defendant No.2 has failed to establish that the said amount advanced by the plaintiff was towards the price of the goods allegedly sold by Chittal Chemicals to the plaintiff on 28/6/1986. The learned Single Judge while negating the defence of the defendant No.2

observed thus:

> " Even for an ordinary man the theory put forth by the Defendant No.2 in his written statement and in his affidavit of evidence is difficult to digest. It is full of improbabilities and falsities. The figure of Rs.2,96,817/- is being carried on by the Plaintiff right from the year 1984 for all the subsequent transactions. Firstly, Kirtivardhika Corporation sold chemicals worth Rs.2,96,817/- to the Defendant No.2, Defendant No.2 paid cheque, then Defendant No.2 sold the same items after two years to the Plaintiff without any fluctuation of price or quantity or quality for the same price and Plaintiff paid the cheque towards the price. It is impossible to believe that the goods sold in 1984 would be again sold for the same price of the same quality without even change of one rupee in the price after two years and again would be purchased back in the third transaction."

24. We find ourselves in aqgreent with the view of the learned Single Judge. The defendant No.2 having failed to establish the nature of transaction as suggested by him, on consideration of the matter the learned Single Judge cannot be said to have erred in accepting the case of the plaintiff that this payment of Rs.2,96,817/- dated 8/7/1986 was towards the loan.

25. The contention that the cheque for Rs.2,96,817/- drawn by the defendant No.2 from the account of MDC on 7/4/1987 in favour of the plaintiff was in lieu of the goods agreed to be sold by the

plaintiff to the defendant No.2 on 7/4/1987 as already indicated above is unnacceptable. The defence set up by the defendant No.2 that as per the agreement the delivery of goods and payment was to be made simultaneously is all concocted and not at all established. From the available evidence no doubt remains that the defendant No.2 is bound and liable to pay to the plaintiff the amount of Rs.2,96,817/- received by him from the plaintiff on account of Chittal Chemicals on 8/7/1986. In these circumstances, we do not find any fault in the Judgment and order of the learned Single Judge in decreeing the suit against the defendant No.2.

26. As regards the appeal filed by the defendant No.1 bank is concerned, it must be stated that the conduct of the officers of defendant No.1 in the present case is far from satisfactory. Even if the explanation of the bank that the entries in the accounts of the parties were made in the ordinary course before realisation of the cheque is to be accepted, the entries made in the passbook even before the cheque is cleared does not appear to be in the ordinary course of business. Apart from that, the case of the bank that the receipt entries in the cashier’s cash register were made on 9/4/1987 (Exhibit P-8)

without receiving cash amount of Rs.3,00,000/- is really surprising. The lady officer who was examined by the bank has sought to justify her action in making entry in the cash scroll register by stating that the pay in slip must have been signed and stamped by the cashier. The said pay in slip for Rs.3,00,000/- was not tendered in evidence. No explanation was offered as to what happened to the said pay in slip for Rs.3,00,000/-. The bank has not even chosen to examine the cashier to explain the circumstances in which he made the entry in the cash register to show receipt of Rs.3,00,000/- from the defendant No.2 without actually receiving the amount. It is not explained how the cashier could sign and stamp the pay in slip if he had not received the cash. We strongly condemn the casual approach with which the officers of defendant No.1 nationalised bank have handled the present case.

27. However, on perusal of the bank accounts, it is seen that on 9/4/1987 the plaintiff had credit balance of only Rs.671.75 in the account of Kirtivardhika Corporation. From that account he could withdraw Rs.2,97,000/- only if the cheque dated 7/4/1987 for Rs.2,96,817/- deposited by him (drawn by MDC) was duly cleared and credited to the account of Kirtivardhika Corporation. On 9/4/1987 in the ledger

account of MDC there was debit balance of Rs.1,59,170.60 leaving only Rs.90,829.40 available for withdrawal. Therefore, the cheque for Rs.2,96,817/- given by MDC to the plaintiff could be cleared only if the funds were made available in the account of MDC. In the ledger account of MDC maintained by the bank it is seen that one line is kept blank between the debit balance of Rs.1,59,170.60 and the debit entry for Rs.2,97,000/-. The said debit entry is deleted. One line might have been kept blank to record credit entry if the funds were made available. However, no credit entry was made in the ledger account. Therefore, there being only debit balance, the cheque for Rs.2,97,000/- could not have been cleared from the account of MDC. Thus, the case of the bank that on receiving the stop payment instructions the debit entries made in the ledger account of MDC in anticipation of funds were deleted appears to be correct.

28. It is true that in the cashier’s cash register and in the officer’s cash scroll register there is an entry to show receipt of Rs.3,00,000/- in the account of MDC and the same has been deleted. As stated hereinabove, the said credit is not entered in the ledger account of MDC. Circumstances in which the receipt entry for Rs.3,00,000/- were made in the cash

register and the cash scroll and whether deletion of the said entries visits any criminal liability on the bank may be gone into in the pending criminal proceedings.

29. However, for the purpose of these appeals, it is sufficient to note that in the present case, the case of the plaintiff is that the receipt of Rs.3,00,000/- shown in the account of MDC comprised of Rs.3,000/- deposited by the defendant No.2 and Rs.2,97,000/- appropriated from the withdrawal cheque presented by the plaintiff. In other words, the case of the plaintiff is that the receipt of Rs.3,00,000/- shown in the account of MDC (as per cash receipt register and cash scroll) comprised of Rs.3,000/- deposited by the defendant No.2 and the amount of Rs.2,97,000/- due to the plaintiff under token No.27. As stated hereinabove, the withdrawal cheque for Rs.2,97,000/- presented by the plaintiff could not be honoured as enough funds were not available in his account. Thus, although the bank had bungled in maintaining the accounts, on perusal of the accounts maintained by the bank it is seen that there was no transfer of funds from the account of MDC to the account of Kirtivardhika Corporation and consequently the plaintiff could not withdraw Rs.2,97,000/- from the

account of Kirtivardhika Corporation. Since the withdrawal cheque of the plaintiff for Rs.2,97,000/- was not honoured, there was no question of handing over any amount from the account of the plaintiff to the defendant No.2. Therefore, the case of the plaintiff that the bank has illegally paid the amount of Rs.2,97,000/- from his account to the defendant No.2 cannot be accepted. In these circumstances, no liability could be fastened upon the bank on the basis of the entries made and deleted in the registers of the bank when the plaintiff has failed to prove that the amounts from his account have been transferred to the account of MDC.

30. For all the aforesaid reasons, we find it difficult to sustain the decree passed by the learned Single Judge against the defendant No.1 bank.

31. In the result, the appeal No.58 of 2004 filed by the defendant No.1 bank is allowed and the decree passed by the learned Single Judge against the defendant No.1 bank is set aside. The appeal No.721 of 2003 filed by the defendant No.2 is dismissed.

32. Both the appeals are disposed of accordingly with no order as to costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)